

LENDER LIABILITY: CIVIL LIABILITY REGIMES FOR ENVIRONMENTAL HARM

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I. INTRODUCTION

Lenders in the 1990s are increasingly being forced to take notice of environmental risks in their lending practices in both the United States and abroad.¹ Lending risks associated with environmental contamination

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1. See Howard M. Shanker, *A Lender's Guide to Environmental Policy Development*, 111 BANKING L.J. 540 (1994) (discussing Comprehensive Environmental Response, Compensation, and Liability Act impact on lending policies); see generally *Where Bankers Fear to Tread*,

by borrowers include: (1) decreased value of collateral; (2) reduced ability to pay by borrower, or insolvency due to remediation costs; (3) direct liability of lender for clean-up costs where lender assumes control over collateral; (4) subordination of lender's lien²; (5) incurred "walk-away" costs by not foreclosing on contaminated property due to fear of environmental liability; and (6) tort damages for personal or property injuries.³ Thus, where in the past a lender's liability was limited to its collateral holdings, environmentally conscience legislation has broadened to reach the "deep pockets" of today's modern lending institutions.⁴

Environmental legislation has made lender liability risk assessment a central concern of secured creditors in the United States.⁵ In response to hazardous waste concerns and incidents such as Love Canal in New York and Times Beach in Missouri,⁶ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)⁷ was enacted in 1980. The Act authorized the government to clean up hazardous waste sites when responsible parties failed to act to prevent or remedy hazardous incidents and to recover the costs from such parties.⁸ Although CERCLA provides a "safe harbor" exemption for secured creditors,⁹ conflicting court decisions as to the scope of this exemption have opened the door for remedial liability where contaminated property is held merely as collateral.¹⁰ Lending institutions, therefore, are subject to liability where

ECONOMIST, May 21, 1994, at 85 (discussing lending disincentives due to environmental liability risks).

2. Shanker, *supra* note 1, at 540.

3. Scott Vaughn, U.N. Environmental Programme, Environment and Trade/Environment and Economics Unit, Environmental Risk and Commercial Banks: Discussion Paper 7 (August 1994) [hereinafter Discussion Paper].

4. HELEN D. CHAITMAN, *THE LAW OF LENDER LIABILITY* 9-2 (1990).

5. Discussion Paper, *supra* note 3, at 9.

6. John C. Cruden, *CERCLA Overview*, C921 A.L.I.-A.B.A. 391, 393 (1994); *see also* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 35 (1982).

7. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (1994) [hereinafter CERCLA].

8. 42 U.S.C. §§ 9631 (repealed 1986), 9607(a)(4)(A); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 576 (D. Md. 1986).

9. 42 U.S.C. § 9601(20)(A) (1994). The provision excludes from the definition of "owner or operator" such person "who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." *Id.*

10. *Kelley v. EPA*, 15 F.3d 1100, 1103 (D.C. Cir. 1994); *see infra* part II.A (discussing judicial interpretation of "safe harbor" provision).

they are found to be a responsible party under CERCLA's strict liability standard.¹¹

Thus far, an estimated 5000 - 7000 sites have been identified for clean-up in the United States under CERCLA, with an additional 20,000 estimated for future remedial action.¹² Such clean-up costs average thirty-one million dollars per site with aggregate costs estimated at \$500 billion.¹³ Therefore, the associated lender costs may be substantial for both existing and future loans. Consequentially, environmental risk assessment has taken prominence in United States lending practices to ensure sufficient capital, and to minimize exposure to environmental liability.¹⁴

Similarly, recent trends in the European Community (EC)¹⁵ demonstrate a new impetus to codify a uniform set of environmental standards which may impact civil liability for lenders. In the spring of 1993, the European Commission¹⁶ introduced its Green Paper on Repairing Damage to the Environment¹⁷ (Green Paper). The Green Paper was the first step in advancing the EC's "Fifth Environmental Action Programme."¹⁸ The Programme's central goal is the internalization of external ecological costs in the life cycle of products from their source to

11. *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991); *see* 42 U.S.C. § 9607(a)(1) (1994); Cruden, *supra* note 6, at 394-95.

12. Discussion Paper, *supra* note 3, at 6.

13. *Id.*

14. Shanker, *supra* note 1.

15. Treaty Establishing the European Economic Community [EEC Treaty], Mar. 25, 1957, 298 U.N.T.S. 11. The EEC Treaty was modified to create the European Union in 1992 which includes Belgium, Denmark, France, Ireland, Italy, the Federal Republic of Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. Treaty on European Union [Maastricht Treaty], Feb. 7, 1992, 31 I.L.M. 247. On January 1, 1995, the E.U. expanded to include Austria, Finland, and Sweden. *European Union: Rocky Transition From Twelve to Fifteen*, EURO. REP., Jan. 6, 1995.

16. The European Commission is one of four primary institutions which governs the EC. The Commission proposes and administers legislation. The Council of Ministers is the primary legislative body which consults and approves legislation. The European Parliament is the EC representative body which consults and amends legislation. The European Court of Justice interprets enacted legislation. *See generally* Maastricht Treaty, *supra* note 15, arts. 137, 157, 189.

17. Communication from the Commission to the Council, Parliament and the Economic and Social Committee: Green Paper on Remedying Environmental Damage, COM(93)47 [hereinafter Green Paper].

18. A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, 1993 O.J. (C 138) 1 [hereinafter Fifth Programme].

their disposal.¹⁹ As a communication paper by the Commission to the Council of Ministers and Parliament, the Green Paper explores the utility of civil liability to remedy environmental damage and finance remediation costs.²⁰ Like CERCLA, the Green Paper promulgates a strict liability standard to govern environmental damage.²¹

The Green Paper was in part facilitated by the development of the Council of Europe's²² Convention on Civil Liability Resulting from Activities Dangerous to the Environment (Convention).²³ The Convention seeks to ensure adequate compensation for damage to the environment resulting from dangerous activities.²⁴ Like CERCLA and the Green Paper, the Convention advocates a strict liability standard but explicitly adopts a "polluter pays" principle.²⁵ With the EC formulating a community standard for civil liability, both CERCLA and the Convention will impact any final proposed legislation by the Commission.

This paper is designed to explore the various implications of national and supranational legislation on lender liability risks. Section II(A) analyzes the United States CERCLA experience with a specific emphasis on the judicial treatment of the secured creditor exemption. Section II(B) examines more closely the regulatory attempts at defining this exemption and discusses future prospects in Congress. Section III takes a comparative look at European efforts to define a supranational environmental standard and contrasts it with the United States' experience. Finally, Section IV articulates the specific lessons the EU can learn from CERCLA and proposes general guidelines for a community wide civil liability regime.

19. See Patrick Thieffry, *Environmental Liability in Europe: The European Union's Projects and the Convention of the Council of Europe*, 28 INT'L L. 1083, 1083-84 n.3 (1994).

20. Green Paper, *supra* note 17, § 1.0; see also Susan Nolan, Comment, *Foreclosing on Lender Liability: The European Union Launches Environmental, Civil Liability Legislation*, 7 TRANSNAT'L L. 257 (1994).

21. Green Paper, *supra* note 17, § 4.1.2.

22. The Council of Europe should not be confused with any institution of the European Union. It was created in 1948 to promote political and military integration in Europe. Its membership includes a total of twenty-one European states many of which are EU Member States. Nolan, *supra* note 20, at 259.

23. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, Eur. T.S. 150, *reprinted in* 32 I.L.M. 1230 (1993) [hereinafter Convention].

24. *Id.* art. 1.

25. *Id.* pmbl.

II. CERCLA

A. *Judicial Treatment of the Secured Creditor Exemption*

CERCLA imposes liability on four categories of responsible parties for costs associated with the release of hazardous substances under 42 U.S.C. § 9607(a).²⁶ These categories include:

- (1) the owner and operator of a vessel or a facility;
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . . ; and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities.²⁷

The United States is authorized to recover all costs of removal incurred by the Government, State, or Indian Tribe, all other necessary costs of response, damages for injuries to, destruction of, or loss of natural resources; and health assessment or study costs.²⁸ CERCLA does provide three affirmative defenses for responsible parties where the release was caused by an act of God, an act of war, or an act or omission by a third party.²⁹

Lender liability derives from the “owner and operator” language of § 9607(a). The operative definitional section of CERCLA that is of particular importance to lenders is § 9601(20)(A).³⁰ In the case of a

26. 42 U.S.C. § 9607(a) (1994).

27. 42 U.S.C. § 9607(a).

28. 42 U.S.C. § 9607(a).

29. 42 U.S.C. § 9607(b).

30. 42 U.S.C. § 9601(20)(A) provides:

The term owner or operator means

i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, ii) in the case of an onshore facility or offshore facility, any person owning or operating such facility, iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand.

42 U.S.C. § 9601 (20)(A).

facility,³¹ CERCLA defines "owner or operator"³² as "any person owning or operating such facility."³³ Congress created a safe harbor exemption for secured creditors by excluding from the definition any owner or operator "who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."³⁴ A defendant has the burden of establishing an entitlement to this exemption.³⁵

However, Congress did not define the key provisions of this exception including the phrases "participating in management," "indicia of ownership," and "primarily to protect [a] security interest." Legislative history indicates that the secured creditor exception was created to protect mortgage interests under both the state law title and lien theories.³⁶ The "indicia of ownership" language was apparently used to incorporate the title theory into the exemption. Under the common law title theory of mortgages, a lender is deemed to hold ownership indicia of property despite a lack of possession because the mortgage conveys actual title to the land.³⁷ Conversely, under the lien theory no title is conveyed so no ownership interest is present for CERCLA purposes.³⁸ Thus, the language choice indicates that "Congress intended to protect banks that hold

31. 42 U.S.C. § 9601(A)(9) (1994). CERCLA defines "facility" as:

(A) any building, structure, installation, equipment, pipe or pipeline. . . , well, pit, pond, lagoon, impoundment, ditch, *landfill*, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id.

32. It is important to note that the actual word choice of the definitional section of § 9601(20)(A) is in the disjunctive while the operative language of § 9607(a)(1) is in the conjunctive. Despite this inconsistent usage, the courts have repeatedly construed the language in the disjunctive to be in accordance with legislative history and the result of careless drafting. See, e.g., *Fleet Factors Corp.*, 901 F.2d at 1554 n.3; *Maryland Bank & Trust Co.*, 632 F. Supp. at 577-78. The House of Representatives has recognized this error and has substituted the disjunctive form in its reauthorization bill. See THE SUPERFUND REFORM ACT OF 1995, H.R. DOC. NO. 228, 104th Cong., 1st Sess. 403 (1995).

33. 42 U.S.C. § 9607(a)(2).

34. 42 U.S.C. § 9601(20)(A).

35. *Fleet Factors Corp.*, 901 F.2d at 1555; *Maryland Bank & Trust Co.*, 632 F. Supp. at 578.

36. Note, *Cleaning up the Debris After Fleet Factors: Lender Liability and CERCLA's Security Interest Exemption*, 104 HARV. L. REV. 1249, 1258 (1991); see Peter Lavalette, Note, *The Security Interest Exemption Under CERCLA: Timely Relief from the EPA*, 24 U. TOL. L. REV. 473, 478 (1993).

37. Lavalette, *supra* note 36, at 480.

38. *Id.*

mortgages in jurisdictions governed by the common law of mortgages" under the title theory³⁹ to the same degree as lien mortgage jurisdictions.⁴⁰

Although the indicia of ownership criteria may be sufficiently broad to reach several theories of ownership, most of the controversy and uncertainty surrounding the secured creditor exemption derives from the "participation in management" provision.⁴¹ Where a lender is deemed to have acted in a managerial capacity, the lender is not able to use the exemption.⁴² However, the lack of legislative history relating to this provision has created difficulties in interpretation and has resulted in varied judicial standards among the circuits.⁴³ In June 1991, the Environmental Protection Agency (EPA) responded by promulgating its proposed rules to clarify the secured lender exception.⁴⁴ The EPA specifically noted that the need for the rules was justified by the lack of uniformity in judicial interpretation and the absence of guidance due to scant legislative history.⁴⁵ After reviewing over 350 comments on the proposed rules, the EPA released its final version in April of 1992 to "clarify and specify the range of activities that may be undertaken" by a secured creditor without losing the protection of the exemption.⁴⁶ The final rules sought to do this by defining the ambiguous key phrases of § 9601(20)(A).⁴⁷ However, on February 4, 1994, the United States Court of Appeals for the District of Columbia nullified these rules holding that the

39. *Maryland Bank & Trust Co.*, 632 F. Supp. at 580.

40. See National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,444, 18,350-51 (1992) (EPA lender liability rules providing the definitions of "security interest" and "indicia of ownership" are meant to ensure secured creditors in both jurisdictions fall within the exemption).

41. John R. Zebrowski, *Ruling Raises Red Flag on Environmental Liability*, AM. BANKER, Apr. 29, 1994, at 20.

42. 42 U.S.C. § 9601(20)(A)(iii) (1994). "[T]he statutory language chosen by Congress explicitly holds secured creditors liable if they participate in the management of a facility." *Fleet Factors Corp.*, 901 F.2d at 1557.

43. Compare *Fleet Factors Corp.*, 901 F.2d at 1550 (holding management extends to capacity to influence treatment of hazardous waste) with *United States v. Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) 20,994 (E.D. Pa. Sept. 4, 1985) (limiting the scope of management to operational activities).

44. National Oil and Hazardous Substances Pollution Contingency Plan: Lender Liability Under CERCLA, 56 Fed. Reg. 28,798 (1991) (proposed June 24, 1991).

45. *Id.* at 28,799.

46. National Oil and Hazardous Substances Pollution Contingency Plan: Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992) (codified at 40 C.F.R. § 300.1100 (1992)) [hereinafter EPA Rules]; see also Joseph D. Uradnick, Note, *Secured Lender Liability Under CERCLA*, 27 NEW ENG. L. REV. 109, 110 (1992).

47. 40 C.F.R. § 300.1100(c) (1994).

EPA exceeded its statutory authority.⁴⁸ Thus, the prior case law interpreting the secured creditor exemption is still controlling and a survey of the conflicting standards is appropriate to gauge the liability risks for lenders.

The interpretive history of the secured creditor exemption is essentially defined by two federal district court cases⁴⁹ and two circuit court holdings.⁵⁰ These decisions have promulgated four basic standards for judging when a lender's participation in management or ownership causes the lender to forfeit its exemption. These basic standards are the "day-to-day" participation standard,⁵¹ the "vested title" rule,⁵² the "influence" standard,⁵³ and the "actual management" standard.⁵⁴

In *United States v. Mirabile*,⁵⁵ the United States District Court for Eastern Pennsylvania held that the foreclosure of a security interest without active participation in the day-to-day operations of the facility did not destroy the secured creditor exemption of §9601(A)(20).⁵⁶ The case involved the American Bank & Trust Company (ABT), Mellon Bank National Association (Mellon), and the Small Business Administration (SBA), all of whom were financing the operations of a paint manufacturer, Turco Coatings, Inc. (Turco), when a hazardous waste condition developed at a Turco site.⁵⁷ The United States sued to recover clean-up costs associated with the removal of drums of waste from the Mirabiles who joined the banks as third party defendants.⁵⁸

After Turco's petition for bankruptcy reorganization was denied, ABT foreclosed on the site which it had secured by a mortgage, purchased it at a sheriff's sale, and assigned its bid to the Mirabiles who were the existing owners at the time the suit was brought.⁵⁹ During the four months

48. *Kelley*, 15 F.3d at 1100.

49. *Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,994; *Maryland Bank & Trust Co.*, 632 F. Supp. at 573.

50. *Fleet Factors Corp.*, 901 F.2d at 1550; *In re Bergsoe Metal Corp.*, 910 F.2d 668 (9th Cir. 1990).

51. *Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,994.

52. *Maryland Bank & Trust Co.*, 632 F. Supp. at 573.

53. *Fleet Factors Corp.*, 901 F.2d at 1550.

54. *Bergsoe Metal Corp.*, 910 F.2d at 668.

55. *Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,994.

56. *Id.* at 20,996.

57. *Id.* at 20,995-96.

58. *Id.* at 20,995.

59. *Id.* at 20,996.

before the assignment, ABT protected the property from vandalism, showed the property to prospective buyers, and inquired about the disposal of waste drums on the property.⁶⁰ Mellon held a security interest in the inventory and assets of Turco which it sold after the failed bankruptcy petition.⁶¹ In addition to the security interest, a loan officer of Girard Bank, Mellon's predecessor, served on Turco's advisory board which was to oversee operations.⁶² SBA was secured by a second mortgage on Turco's real property and held a second lien in machinery, equipment, inventory, and accounts receivable.⁶³ The loan agreement provided for management assistance by SBA which was never provided. Additionally, the SBA never held legal title to any of its secured interests although its loan representatives did visit the facility to oversee the liquidation of assets.⁶⁴ All three lenders moved for summary judgment asserting that their control was limited to a financial interest and as such were exempt under the secured creditor exemption.⁶⁵

In considering the lenders motions for summary judgment, the court interpreted the language of the exemption as "plainly [suggesting] that provided a secured creditor does not become overly entangled in the affairs of the actual owner or operator of a facility, the creditor may not be held liable for clean-up costs."⁶⁶ Such financial involvement differed from the day-to-day operational aspects of the facility contemplated by the statute.⁶⁷ In granting summary judgment for ABT and SBA, the court stated, "[m]ere financial ability to control waste disposal practices of the sort possessed by the secured creditors in this case is not . . . sufficient for the imposition of liability."⁶⁸ ABT's actions were deemed "prudent and routine steps" of a secured creditor attempting to protect its investment.⁶⁹ Despite SBA's loan agreement, which contemplated active participation in management, the court was persuaded by the fact that SBA never held title to its secured interests and never actually participated.⁷⁰ However,

60. *Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,996.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. 42 U.S.C. § 9601(20)(A).

66. *Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,995.

67. *Id.*

68. *Id.*

69. *Id.* at 20,996.

70. *Id.* at 20,997.

Mellon's motion for summary judgment was denied because the court found there was sufficient evidence that Mellon's predecessor was involved on a day-to-day basis in the operation of Turco.⁷¹

In *United States v. Maryland Bank & Trust Co.*,⁷² the Federal District Court of Maryland refused to apply the "day-to-day" standard analysis where legal title had vested in the secured creditor. Maryland Bank & Trust (MBT) attempted to apply the broad financial control standard of *Mirabile* to a secured lender who had foreclosed on property and then purchased it at the foreclosure sale, protecting its security interest in and acquiring legal title to the property.⁷³ The court explicitly rejected MBT's argument finding that the "legislative history and policies behind the Act counsel against such a generous reading of [the secured creditor] exclusion."⁷⁴

In *Maryland Bank and Trust Co.*, MBT had extended credit to Herschel McLeod, Sr. during the 1970s for his two sanitation businesses, during which time he permitted the dumping of certain hazardous wastes.⁷⁵ In 1980 his son, Mark McLeod, purchased the site with the help of MBT's financing, but he soon failed to make payments. MBT instituted a foreclosure sale in 1981 and purchased the site in 1982, taking title to the property.⁷⁶

After notification by the State of Maryland, the EPA ordered MBT to initiate corrective action by October 1983 or it would institute its own removal action with funding it had already received under CERCLA.⁷⁷ MBT refused to comply so the EPA cleaned up the site at a cost of approximately \$551,713.⁷⁸ Subsequently, the EPA demanded reimbursement for the recovery action from MBT and eventually filed suit to recover the costs.⁷⁹

71. *Mirabile*, [1985] 15 Env'tl. L. Rep. (Env'tl. L. Inst.) at 20,997.

72. *Maryland Bank & Trust Co.*, 632 F. Supp. at 573.

73. *Id.* at 579.

74. *Id.* at 580 (footnote omitted). The court made this finding with specific reference to the *Mirabile* decision distinguishing it on the fact that the property in question had been assigned. *Id.*

75. *Id.* at 575. The hazardous wastes included toluene, ethylbenzene, total xylenes, lead, chromium, mercury, and zinc.

76. *Maryland Bank & Trust Co.*, 632 F. Supp. At 575. MBT remained the record owner of the site for the duration of the proceedings.

77. *Id.* Mark McLeod actually notified local officials of the waste dumping on the site in June, 1983.

78. *Id.*

79. *Id.* at 575-76.

Interpreting the definition of "owner or operator,"⁸⁰ the court recognized Congress' intent to exclude lenders from CERCLA liability who held title under the title theory of mortgages by the broad "indicia of ownership" language.⁸¹ However, the court declined to find that this language extended to a lender whose security interest ripened into full legal title by a foreclosure sale.⁸² "[MBT] purchased the property at the foreclosure sale not to protect its security interest, but to protect its investment. Only during the life of the mortgage did [MBT] hold indicia of ownership primarily to protect its security interest in the land."⁸³ The court further noted that to extend the exemption to the case at bar would give secured creditors a windfall while burdening the government and subsequent purchasers with the response costs.⁸⁴

In essence, the defendant's position would convert CERCLA into an insurance scheme for financial institutions, protecting them against possible losses due to the security of loans with polluted properties. Mortgagees, however, already have the means to protect themselves, by making prudent loans. Financial institutions are in a position to investigate and discover potential problems in their secured properties. For many lending institutions, such research is routine. CERCLA will not absolve them from responsibility for their mistakes of judgment.⁸⁵

Thus, where a lender is confronted with a defaulting debtor who may be subject to CERCLA liability, the lender is faced with a dilemma: either purchase the property to protect its security interest and be subject to liability while it holds title, or forego its investment and incur a loss on the loan.⁸⁶

80. 42 U.S.C. § 9601(20)(A).

81. *Maryland Bank & Trust Co.*, 632 F. Supp. at 579-80; see discussion *supra* notes 36-39.

82. *Id.* at 579. "The exemption of subsection (20)(A) covers only those persons who, at the time of the clean-up, hold indicia of ownership to protect a then held security interest in the land. . . . The security interest must exist at the time of the clean-up." *Id.*; see *Guidice v. BFG Electroplating & Mfg.*, 732 F. Supp. 556, 562-63 (W.D. Pa. 1989) (secured creditor exemption did not apply where creditor is record owner of foreclosed property).

83. *Maryland Bank & Trust Co.*, 632 F. Supp. at 579.

84. *Id.* at 580; see also *Guidice*, 732 F. Supp. at 563.

85. *Maryland Bank & Trust Co.*, 632 F. Supp. at 580 (footnotes omitted); see EPA Rules, *supra* note 46, at 18,346.

86. Joseph D. Uradnick, Note, *Secured Lender Liability Under CERCLA*, 27 NEW ENG. L. REV. 109, 115 (1992); *Kelley*, 15 F.3d at 1104.

In *United States v. Fleet Factors Corp.*,⁸⁷ the United States Court of Appeals for the Eleventh Circuit addressed the secured creditor exemption as an issue of first impression at the federal appellate level.⁸⁸ The court explicitly rejected the distinction between per se permissible participation in the financial management of a facility and impermissible "day-to-day" participation promulgated by the district court in *Mirabile*. The court stated that a standard which permitted financial management while prohibiting operational management ignored the plain language of the exemption and rendered it meaningless.⁸⁹ It noted that such a construction was too permissive towards secured creditors and that in order to achieve the "overwhelming remedial" goal⁹⁰ of CERCLA, "ambiguous statutory terms (such as 'participation in management') should be construed in favor of liability for the costs incurred by the government."⁹¹ However, the court did reject the proposition that any participation in the management was sufficient to bar the application of the exemption.⁹² Instead, the court adopted a new standard in which "a secured creditor may incur § 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."⁹³ Fleet Factors Corporation (Fleet) agreed to advance funds to Swainsboro Print Works (SPW) in 1976 against the assignment of SPW's accounts receivable and in exchange for a security interest in SPW's textile facility and all of its equipment, inventory, and fixtures.⁹⁴ In 1981, when SPW's debt to Fleet exceeded the estimated value of SPW's accounts receivable, Fleet stopped advancing funds to SPW who subsequently ceased operations and began liquidating its assets.⁹⁵ In 1982, after SPW had been adjudicated bankrupt and a trustee assumed title and control of the facility, Fleet foreclosed on its security interest in some of the inventory and equipment. Fleet also contracted with third parties to auction off the collateral, to remove unsold equipment, and to leave the

87. *Fleet Factors Corp.*, 901 F.2d at 1550.

88. *Id.* at 1556.

89. *Id.* at 1557-58.

90. *Id.* at 1557 (quoting *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990)).

91. *Id.*

92. *Fleet Factors Corp.*, 901 F.2d at 1556.

93. *Id.* at 1557 (footnotes omitted).

94. *Id.* at 1552.

95. *Id.*

facility “broom clean.”⁹⁶ Emanuel County, Georgia acquired title to the facility in 1987 at a foreclosure sale resulting from SPW’s failure to pay taxes.⁹⁷ In 1984, the EPA discovered 700 fifty-five gallon drums of toxic waste and forty-four truckloads of asbestos materials abandoned on the site.⁹⁸ Subsequently, the EPA incurred \$400,000 in remediation costs and brought suit to recover its expenses from SPW’s majority stockholders and Fleet.⁹⁹

In the lawsuit, the first issue addressed by the circuit court was whether Fleet was liable under § 9607(a)(1) as an “owner or operator” due to its participation immediately before Emanuel County took title to the facility in 1987. Under § 9701(20)(A)(iii), the term “owner or operator” extends to any person who owned, operated, or otherwise controlled the activities of a facility immediately before a unit of state or local government takes title or control of a facility conveyed by bankruptcy, foreclosure, tax delinquency, abandonment, or any other similar means.¹⁰⁰ The court held that because the bankrupt estate and trustee were the previous owners of SPW it would be a torture of the plain statutory language to impose liability on Fleet.¹⁰¹ The fact that the bankrupt estate or trustee may not have exercised its control or that Fleet may have engaged in control several years earlier was unimportant because Fleet had had no involvement with the facility for three years.¹⁰² Thus, the court upheld the district court’s grant of summary judgment for Fleet.

However, Fleet was less successful on the issue of whether it had participated in the management of SPW at the time of disposal of the hazardous substances under § 9607(2).¹⁰³ The court found that Fleet’s financial management was “pervasive, if not complete.”¹⁰⁴ Answering

96. *Id.* at 1552-53 (the third party contracted to clean the facility left it in December 1983).

97. *Fleet Factors Corp.*, 901 F.2d at 1553.

98. *Id.*

99. *Id.*

100. *See supra* note 30 and accompanying text.

101. *Fleet Factors Corp.*, 901 F.2d at 1555. The court ruled that the “immediately beforehand” language of § 9601(20)(A)(iii) meant without intervening ownership, operation, or control thus Fleet was not liable because it did not own, operate or control SPW. *Id.*

102. *Id.*

103. *See supra* note 30 and accompanying text.

104. *Fleet Factors Corp.*, 901 F.2d at 1559. Fleet had required its approval before shipping, established pricing, dictated when and to whom goods were shipped, determined when employees should be laid off, supervised the office administrator’s activities at the site, processed employee tax forms, controlled access to the facility, and contracted for the disposal of its equipment. *Id.*

Fleet's contention that it was merely acting to protect its security interest through financial management, the court stated that the scope of the secured creditor exemption was determined by the nature and extent of the creditor's involvement with the facility, not the creditor's motive.¹⁰⁵ A lender's capacity to influence a debtor facility's handling of hazardous waste is to be inferred from the extent of its involvement in the facility's general management which includes financial management.¹⁰⁶ Thus, the "influence" standard promulgated by the court's interpretation of § 9607(20)(A) narrowed the application of the exemption, thereby subjecting lenders to CERCLA liability even where there was no active participation in management or decisions relating to hazardous waste.¹⁰⁷

In dicta, the court defended its interpretation to challenges that it would lead to disincentives for lenders to extend credit to businesses with potential hazardous waste problems, encourage hands-off management policies, and ultimately result in the perpetuation of hazardous waste treatment problems.¹⁰⁸ The court essentially argued that the "influence" standard would improve hazardous waste handling through the internalization of hazardous waste costs in loan agreements and through increased policing by the financial community. Thus, creditors would incur no greater risks than those they bargained for and would monitor and insist on environmental compliance by borrowers.¹⁰⁹ Any increased costs that are borne by innocent borrowers due to a restrictive credit market are consistent with the general effect of cost-spreading throughout the hazardous waste industry.¹¹⁰ Furthermore, the court insisted that nothing in its discussion prohibits a lender from monitoring any aspect of a debtor's business, or becoming involved in "occasional and discrete financial decisions relating to the protection of its security interest without incurring liability."¹¹¹ The *Fleet Factors* court buttressed its position by quoting *Maryland Bank's* dicta asserting that CERCLA was not meant to be an

105. *Id.* at 1560; see *Bergsoe*, 910 F.2d at 672 n.2; EPA Rules, *supra* note 46, at 18,354.

106. *Fleet Factors Corp.*, 901 F.2d at 1559 n.13.

107. *Id.* at 1558. "Rather a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose." *Id.*

108. *Id.*

109. *Id.*; see also Howard M. Shanker, *A Lender's Guide to Environmental Policy Development*, 111 BANKING L.J. 540 (1994) (discussing generally green conscious loan policies to reduce environmental liability).

110. *Fleet Factors Corp.*, 901 F.2d at 1559 (quoting Scott Wilsdon, Note, *When a Security Becomes a Liability: Claims Against Lenders in Hazardous Waste Cleanup*, 38 HASTINGS L.J. 1261, 1294 (1987)).

111. *Fleet Factors Corp.*, 901 F.2d at 1558.

insurance scheme for lenders who had the ability to protect themselves through prudent loans.¹¹² Nevertheless, the *Fleet Factors* decision has been the subject of great criticism by the financial community and is regarded as a shocking, or bombshell opinion.¹¹³

In the second of the major circuit court holdings, *In re Bergsoe Metal Corp.*,¹¹⁴ the Court of Appeals for the Ninth Circuit qualified the *Fleet Factors* interpretation holding that “whatever the precise parameters of ‘participation,’ there must be some actual management of the facility before a secured creditor will fall outside the exception.”¹¹⁵ *Bergsoe* emphasized that as a threshold matter, a creditor must exercise actual management authority before it can be held liable because the CERCLA exemption uses the active language “participating in management.”¹¹⁶ Where a secured creditor has some input in the planning stages of a loan, or has rights under the terms of the loan agreement, such activity is insufficient to warrant liability because the focus is not on the motive or rights of the lender, but on its actions.¹¹⁷ Thus, merely having the power to get involved in management but not exercising it is insufficient to bar application of the exemption.¹¹⁸ Since the lender never took an active role in any management whatsoever, the court avoided drawing a distinction for purposes of its “actual management” threshold between permissible financial management and day-to-day management.¹¹⁹

The *Bergsoe* decision created an interpretive fissure for the secured creditor exception. Several courts and commentators had interpreted *Fleet Factors* as standing for the proposition the “mere capacity to influence” hazardous waste decisions was sufficient to bar application of the exception even without any actual management, financial or otherwise.¹²⁰ Therefore, *Fleet Factors* was widely read as a repudiation of

112. *Id.* at 1559.

113. See David R. Berz & Peter M. Gillan, *Lender Liability Under CERCLA: In Search of a New Deep Pocket*, 108 BANKING L.J. 4, 5-6 (1991); see also G. Van Velsor Wolf, Jr., *Lender Environmental Liability Under the Federal Superfund Program*, 23 ARIZ. ST. L.J. 531 (1991).

114. *Bergsoe*, 910 F.2d at 668.

115. *Id.* at 672.

116. *Id.* at 672, 673.

117. *Id.*

118. *Id.* at 673 n.3.

119. *Bergsoe*, 910 F.2d at 672. “We leave for another day the establishment of a Ninth Circuit rule on this difficult issue . . . of [a] ‘participation’ [in management standard.]” *Id.*

120. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1369 (9th Cir. 1994); see Shanker, *supra* note 1, at 541; EPA Rules, *supra* note 46, at 18,369.

the Eleventh Circuit management standard. However, this interpretation is too broad. As mentioned above, *Bergsoe* explicitly rejected this interpretation, reading *Fleet Factors* as requiring a creditor to exercise actual management authority to incur liability.¹²¹ The Ninth Circuit Court was simply clarifying a threshold requirement set forth by the *Fleet Factors* decision without deciding the scope or application of the "capacity to influence" standard. Similarly, the EPA recognized the need for some active participation when it promulgated its CERCLA lender liability rules.¹²²

A related point of confusion stems from *Fleet Factors*' distinction between the phrase "participation in management" in the exemption, and the term "operator" for CERCLA liability. Although similar, the court stated in dicta that the two terms or phrases were not congruent such that a lender could be liable under § 9707(a)(2), "without being an operator, by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes."¹²³ Thus, a lender could be liable both as an operator and, alternatively, as a secured creditor who participates in management of a facility.¹²⁴ Since the "participation in management" phrase pertains only to the application of the exemption, the court's imposition of liability on a participation basis alone arguably goes well beyond the definition of "owner or operator" in § 9601(20)(A). A lender would have to qualify as an "owner or operator" before the exemption would have any use because otherwise such a lender would not be liable under § 9607(a)(1) or (a)(2) in the first instance.¹²⁵ Nevertheless, the court interpreted the exemption independently, finding a basis for liability by participation in management alone under its broad "influence" standard.¹²⁶ As a result, the court did not

121. *Bergsoe*, 910 F.2d at 673 n.3. "As did the Eleventh Circuit in *Fleet Factors*, we hold that a creditor must, as a threshold matter, exercise actual management authority before it can be held liable for action or inaction which results in the discharge of hazardous wastes." *Id.*

122. EPA Rules, *supra* note 46, at 18,345. The 11th Circuit did not hold that the mere capacity to influence operations, without more, was a sufficient basis on which to impose liability on a holder. The *Fleet Factors* court stated that a holder could lose the exemption if it was actually involved in the management of a secured facility. *Id.* at 18,369.

123. *Fleet Factors Corp.*, 901 F.2d at 1557 (footnote omitted).

124. *Id.* at 1556 n.6 (defining two bases for liability for a secured lender).

125. *United States v. Kaiser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991) (mistakenly read *Fleet Factors* to hold *Fleet* liable as operator rather than as holder of security interest who participated in management). The E.P.A. recognized the owner or operator prerequisite for CERCLA liability and the use of the exemption. *See* EPA Rules, 40 C.F.R. § 300.1100(d)(3) (1992).

126. *Fleet Factors Corp.*, 901 F.2d at 1557-58.

define the scope of the "operator" language, but cited with approval a decision of a First Circuit District Court.¹²⁷ Ironically, the court later defined the scope of the "operator" language as requiring a person to play an active role in the actual management or supervision of the day-to-day activities of a facility.¹²⁸ Joining a majority of jurisdictions, it held that a parent corporation could only be liable under CERCLA when its actual and pervasive control extends to the daily operations of its subsidiary.¹²⁹ Hence, the Eleventh Circuit appears to have inconsistently adopted a more lenient day-to-day management standard for operators than that which it explicitly rejected for secured creditors under the same definitional section. Again, the *Bergsoe* court side-stepped this issue by finding that the actual participation threshold had not been crossed by the secured lender.

B. EPA Final Rules

In order to quell the uncertainty in the financial community generated by the ambiguous judicial standards and scant legislative guidance,¹³⁰ the Environmental Protection Agency promulgated its final rules "to clarify and specify the range of activities" which a secured lender may undertake to protect a security interest without exposing itself to CERCLA liability.¹³¹ The rules were further necessitated by the increased confusion generated by the *Fleet Factors* decision and the increasing role of the federal government as a secured creditor after taking over failed savings and loans.¹³² The EPA sought to do this by specifically defining the key provisions of the secured creditor exemption:¹³³ (1) "indicia of ownership," (2) "primarily to protect a security interest," and (3) "participating in management of a vessel or facility."¹³⁴

1. Indicia of Ownership

The "indicia of ownership" language as defined by the EPA is broadly defined as "evidence of a security interest, evidence of an interest in a security interest, or evidence of an interest in real or personal property securing a loan or other obligation, including any legal or equitable title to

127. *Id.* at 1558 (citing *Kayser-Roth Corp.*, 724 F. Supp. at 20-21).

128. *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993).

129. *Id.*

130. EPA Rules, *supra* note 46, at 18,344-45; Uradnick, *supra* note 86, at 124.

131. *Id.* at 18,344.

132. *Id.* at 18,345; *see also Kelley*, 15 F.3d at 1104.

133. 42 U.S.C. § 9601(20)(A).

134. EPA Rules, *supra* note 46, at 18,346.

real or personal property acquired incident to foreclosure and its equivalent.”¹³⁵ A noninclusive list of such evidence is enumerated in the final rule.¹³⁶ A holder of a security interest is defined broadly as a person who maintains indicia of ownership to protect that interest including the initial holder, any subsequent holder, a guarantor, or a receiver or similar person who acts on behalf of or for the benefit of a holder.¹³⁷ Furthermore, a person does not have to hold title or a security interest to satisfy the definition.¹³⁸ However, the definition does implicitly limit ownership interests which are associated with debt as opposed to investment interests.¹³⁹

2. Primarily to Protect a Security Interest

In a similarly expansive if not tautological fashion, primarily to protect a security interest “means that the holder’s indicia of ownership are held primarily for the purposes of securing payment or performance of an obligation.”¹⁴⁰ A security interest is defined as “an interest in a vessel or facility created or established for the purpose[s] of securing a loan or other obligation” which includes mortgages, deeds of trust, liens, titles from lease financing transactions as well as a variety of sales transactions, factoring assignments, accounts receivable, financing arrangement, and consignments if established to secure a loan or obligation”.¹⁴¹ The definition explicitly excludes indicia held for investment purposes or any indicia not held primarily to protect a security interest.¹⁴²

3. Participation in Management

The construction of the “participation in management” language is at the heart of the EPA’s rules which seek to “protect ‘lenders from being exposed to CERCLA liability for engaging in their normal course of

135. 40 C.F.R. § 300.1100(a).

136. *Id.* For example, the list included mortgages, deeds of trust, liens, surety bonds, and guarantees of obligations, title held pursuant to a lease financing transaction, title assumed by foreclosure, and their equivalents.

137. *Id.* § 300.1100(a)(1).

138. *Id.* § 300.1100(a).

139. Bruce P. Howard & Melissa K. Gerard, *Lender Liability Under CERCLA: Sorting Out the Mixed Signals*, 64 S. CAL. L. REV. 1187, 1205 (1991).

140. 40 C.F.R. § 300.1100(b).

141. *Id.* § 300.1100(b)(1)

142. *Id.* § 300.1100(b)(2); see EPA Rules, *supra* note 46, at 18,374 (quoting *Maryland Bank & Trust Co.*, 632 F. Supp. at 573).

business.’”¹⁴³ The initially proposed version created a two part general test which was largely retained in the final rules. In the first prong, a holder was considered as participating in management if, while the borrower is still in possession, the holder exercises “decision making control over the borrower’s environmental compliance, such that the security holder has undertaken responsibility for the borrower’s waste disposal or hazardous substance handling practices which results in a release or threatened release.”¹⁴⁴ In the final rules, the EPA removed the proviso which had required an actual or threatened release so as to clarify that “whether or not a holder is participating in a facility’s management is not dependent on any specific environmental outcome.”¹⁴⁵

With respect to the second prong under the proposed version, a secured creditor fell outside the exemption if it exercised control at the management level “encompassing the day-to-day environmental compliance decision making of the enterprise.”¹⁴⁶ However, this terminology was highly criticized as being “awkwardly phrased and poorly defined” because it did not “clearly distinguish between protected and impermissible activities.”¹⁴⁷ Additionally, commentators expressed concerns that holders could “artfully carve out environmental matters” to allow the holder to otherwise operate and manage a facility without being exposed to liability.¹⁴⁸ The final rules were revised to address these concerns, stipulating that a holder participates in management “when it assumes or manifests responsibility for the overall management of the enterprise encompassing the day-to-day decision making over either the enterprise’s environmental compliance or all, or substantially all, of the operational aspects of the enterprise other than environmental compliance.”¹⁴⁹ Consistent with prior court decisions, participation in management does not include the unexercised right to become involved in a facility’s operational decision making.¹⁵⁰ The rules enumerate specific

143. EPA Rules, *supra* note 46, at 18,359 (quoting *Fleet Factors Corp.*, 901 F.2d at 1556).

144. 56 Fed. Reg. 28,798, 28,809 (1991) (proposed June 24, 1991).

145. EPA Rules, *supra* note 46, at 18,359; 40 C.F.R. § 300.1100(c)(1)(i).

146. *Id.* at 18,359.

147. *Id.* at 18,358.

148. *Id.* at 18,360.

149. *Id.* at 18,360; 40 C.F.R. § 300.1100(c)(1)(ii)(A), (B).

150. EPA Rules, *supra* note 46, at 18,379.

activities which do not qualify as participating in management including pre-loan, policing, and workout activities.¹⁵¹

The EPA, however, went one step further by explicitly overruling *Fleet Factors* despite its denial to the contrary.¹⁵² The final rules mandate that participation in management means "actual participation in the management or operational affairs . . . and does not include the mere capacity to influence, or ability to influence."¹⁵³ Furthermore, under the second prong of the general test, "financial or administrative" management is excluded from the scope of the operational aspects of an enterprise¹⁵⁴. In its accompanying comments, the EPA outlined its standard plainly:

Furthermore, the Agency believes that the general test should also reflect the distinction between the control exercised by a person who is exercising decision making authority over the operational aspects of the facility, and the influence that may be exerted (no matter how great) over the borrower by a person who is not part of the facility's decision making hierarchy. In the first instance, a person who is functioning in the capacity of a facility manager is "participating in management" under this final rule. In the latter case, a person who exerts influence over such a facility manager but who has no power to direct or implement operational decisions is not "participating in management," even if the level of influence exerted over the borrower is substantial Accordingly, it is only where the holder actually exercises decision making control over the facility's operation from within the facility's hierarchy . . . does the holder "participate in management."¹⁵⁵

151. 40 C.F.R. § 300.1100(c)(2).

152. The EPA asserts that its rules conform to current judicial decision and specifically *Fleet Factors*. It correctly understood the *Fleet Factors* decision to require a degree of actual management, as clarified in *Bergsoe*, 910 F.2d at 673 n.3, but erroneously narrowed the application of the court's language to operational management claiming it was consistent with the decision. EPA Rules, *supra* note 46, at 18,369.

153. 40 C.F.R. § 300.1100(c)(1).

154. *Id.* § 300.1100(c)(1)(ii)(B). "Financial or administrative activities include functions such as that of credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar function." *Id.*

155. EPA Rules, *supra* note 46, at 18,359.

Such language is extremely hard to reconcile with *Fleet Factors*.¹⁵⁶ As noted above, the court distinctly rejected the distinction between permissible participation in the financial management of a facility and impermissible participation in day-to-day or operational management.¹⁵⁷ Additionally, the court unambiguously stated that a secured creditor could incur CERCLA liability for participation in financial management sufficient to influence hazardous waste decisions.¹⁵⁸ Nevertheless, the EPA rules do harmonize the standards applied to lenders and parent-subsidiary relationships, lending themselves to a greater degree of certainty and predictability.

The EPA rules also deviate from common law norms with respect to the vesting of title at foreclosure. Provided that a lender does not participate in management, or fail to, in good faith, dispose or liquidate its security interest, the final rules allow a lender to foreclose on a security interest and obtain equitable or legal title.¹⁵⁹ The rules specify an array of conditions outlining a secured creditor's obligation to sell, release, or "otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate."¹⁶⁰ The Agency considered the act of foreclosure and post-foreclosure activities to be "necessary incidents to holding ownership indicia primarily to protect a security interest."¹⁶¹ As such, taking title to foreclosed property does not void a secured creditor's indicia of ownership and, therefore, the exemption.

This conclusion is quite contrary to the reasoning and holding of *Maryland Bank & Trust*.¹⁶² As discussed above, the court held that Congress did not intend to extend protection to mortgagees who take title to property through a purchase at a foreclosure sale because the purchase is designed to protect the lender's investment, not its security interest.¹⁶³ Under an alternative construction, the mortgagee-turned-owner would derive a windfall from interim government clean-up activities and increased property value, essentially turning CERCLA into "an insurance scheme for financial institutions, protecting them against possible losses

156. *Fleet Factors Corp.*, 901 F.2d at 1556.

157. *Id.*

158. *Id.* at 1557, 1559.

159. 40 C.F.R. § 300.1100(d).

160. *Id.*

161. EPA Rules, *supra* note 46, at 18,377.

162. *Maryland Bank & Trust Co.*, 632 F. Supp. at 573.

163. *Id.* at 579-80; *see also Guidice*, 733 F. Supp. at 562-63.

due to the security of loans with polluted properties."¹⁶⁴ However, the EPA recognized that CERCLA should not be used as a loan guarantee for lending institutions, but disagreed with this interpretation, and argued that *Maryland Bank & Trust* held simply that "a foreclosing holder could lose the exemption by holding onto the foreclosed-on property for an extended period of time without making any attempt to promptly sell it."¹⁶⁵ With respect to windfalls received by secured lenders, the EPA insisted that any surplus value would ordinarily be returned to the debtor from whom the EPA would "seek to recover any amount by which a person is unjustly enriched by a taxpayer-financed clean-up [sic]."¹⁶⁶

Responses to the EPA's rules were mixed. Although the lending community approved the clarification and protection from CERCLA liability, it sought more permanent protection in the nature of legislative reform.¹⁶⁷ At the same time, the environmental groups complained that the rule expanded the exemption, provided lenders with foreclosure and post-foreclosure immunity, and unfairly placed the burden of proof on plaintiffs where the exemption was invoked.¹⁶⁸ Other commentators questioned the authority of the EPA to create its own substantive liability rules under CERCLA and its possible bias in doing so.¹⁶⁹ Still others responded that the EPA action provided a remarkable opportunity to create predictability in CERCLA's liability scheme and was clearly within its authority.¹⁷⁰ Questions regarding the legal validity of the rules and their continued application were settled by the Court of Appeals for the District of Columbia on February 4, 1994.

4. Current Status of EPA Final Rules on Lender Liability

In *Kelley v. EPA*, the State of Michigan brought suit to challenge the EPA's final rules and asserted that the EPA lacked statutory authority to restrict private rights of action pertaining to liability under §§9607,

164. *Maryland Bank & Trust Co.*, at 580; see *supra* notes 80-87 and accompanying text.

165. EPA Rules, *supra* note 46, at 18,361.

166. *Id.* (quoting Proposed Rules, 56 Fed. Reg. 28,798, 28,806).

167. Uradnick, *supra* note 86, at 132 (citing Environmental Protection Agency, 4 Inside EPA's Superfund Report, No. 17, Aug. 15, 1990); Lavalette, *supra* note 36, at 508; Marianne Lavelle, *Both Sides Oppose Rule That Limits Liability of Lenders*, NAT'L L.J., May 11, 1992, at 19.

168. Uradnick, *supra* note 86, at 133 (citing *Comments of EPA's Proposed Lender Liability Rule*, 22 ENV'T REP. (BNA) No. 17, 1159 (Aug. 23, 1992)).

169. Craig Johnston, *Who Decides Who's Liable Under CERCLA?: EPA Slips a Bombshell into the CERCLA Reauthorization Process*, 24 ENVTL. L. 1045, 1048-49 (1994).

170. Lavalette, *supra* note 36, at 508.

9601(20)(A).¹⁷¹ The EPA first claimed it had authority to promulgate legislative or substantive rules pursuant to the Administrative Procedure Act.¹⁷² However, the Court of Appeals for the District of Columbia agreed with Michigan holding that the EPA failed to demonstrate any explicit or implicit evidence of congressional intent to delegate interpretive authority.¹⁷³ Allowing the EPA to determine the scope of liability was tantamount to allowing a civil prosecutor to make the same determination.¹⁷⁴ Accordingly, the court held that "it cannot be argued that Congress intended EPA, one of many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants."¹⁷⁵

The court further declined to sustain the EPA's argument that the rule should be upheld as being interpretive,¹⁷⁶ demanding deference under the *Chevron test*.¹⁷⁷ Under *Chevron*, where an interpretive rule is based on specific statutory provisions and reflects an administrative agency's construction of the statute, its construction is entitled to substantial judicial deference.¹⁷⁸ However, like the substantive rule argument, a precondition to the application of the *Chevron test* and its corresponding judicial deference is "a congressional delegation of administrative authority."¹⁷⁹ Consequently, the EPA's interpretive argument failed for the same reason as its substantive one—lack of congressional authority. The court summarized that "[W]here Congress does not give an agency authority to determine (usually formally) the interpretation of a statute in the first instance and instead gives the agency authority only to bring the question

171. *Kelley*, 15 F.3d at 1100.

172. EPA Rules, *supra* note 46, at 18,368; *Kelley*, 15 F.3d at 1104.

173. *Kelley*, 15 F.3d at 1105 (citing *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1303 (D.C. Cir. 1991)).

174. *Id.* at 1106 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991)); *see Wagner Seed Co. v. Bush*, 946 F.2d 918, 926 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992); *see also Johnston*, *supra* note 169, at 1047-48. "It is one thing for Congress to agree that the issue of lender liability under CERCLA needs further resolution, or even to agree with the EPA's proposed regulation. It is quite another for Congress to give EPA carte blanche authority to interpret CERCLA's entire liability scheme." *Id.*

175. *Kelley*, 15 F.3d at 1107 (no authority found in language of § 105 or § 106).

176. EPA Rules, *supra* note 46, at 18,344; *Kelley*, 15 F.3d at 1108.

177. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* utilizes a two part test: (1) where statute is unambiguous, agency must fulfill Congressional intent, and (2) where ambiguous, agency interpretation must be based on permissible construction of the statute using traditional tools of statutory interpretation. *Id.* at 843. Furthermore, any such construction must not be arbitrary, capricious, manifestly contrary to the statute, or unreasonable. *Id.* at 844.

178. *Kelley*, 15 F.3d at 1108 (citing *Chevron U.S.A., Inc.*, 467 U.S. at 842-43).

179. *Id.* (quoting *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990)).

to a federal court as the 'prosecutor,' deference to the agency's interpretation is inappropriate."¹⁸⁰

In the court's parting words, it noted that the EPA, before it promulgated its rules, had sought congressional relief to clarify the rules and had been rebuffed; therefore, it ought to try again.¹⁸¹ Following the *Kelley* decision in 1994, this is exactly what the EPA and the lending community has done. The Superfund Reauthorization Act of 1994 was introduced into both the Senate and House of Representatives which expressly provided the authority of the EPA to create substantive rules regarding lender liability, thereby solving the threshold problem in *Kelley*.¹⁸² The bill failed after clearing five congressional committees when Republicans refused to vote separately on provisions of the legislation unrelated to lender liability.¹⁸³ This is not to say that the issue is dead. Two new bills were introduced in the House in early 1995 with the incoming Republican Congress. Republican Representative Fred Upton of Michigan introduced the Lender and Judiciary Fairness in Liability Act of 1995 on January 4, 1995, which seeks to amend CERCLA with language identical to that of the final rules.¹⁸⁴ Similar to the 1994 legislative package, the Superfund Reform Act of 1995 amends §9615 to give the executive explicit authority to enact the lender liability rules of the EPA.¹⁸⁵ At the time of writing, neither bill had reached the congressional floor and was still tied up in committee. However, given the outcry for congressional clarification of CERCLA's liability scheme and current rethinking of environmental protection by the conservative Congress, the likelihood of passage of one or both of these bills is quite high. Both bills appear to be gaining widespread and bipartisan support. Consequently, the EPA lender liability rules would be reinstated overruling *Kelley*.

180. *Id.* (citing *United States v. Western Elec. Co.*, 900 F.2d 283, 297 (D.C. Cir. 1990)). The court's position is support by legislative history which supports the interpretation that Congress intended the courts to determine liability issues. See Johnston, *supra* note 169, at 1049 (citing 126 CONG. REC. S14,964 (daily ed. Nov. 24, 1980) (statement of Sen. Randolph)); H.R. REP. NO. 253(I), 99th Cong., 1st Sess. 74 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2856.

181. *Kelley*, 15 F.3d at 1109 (referring to the failed CERCLA amendments in H.R. 4494, 101st Cong., 2d Sess. (1990); 136 CONG. REC. H1505 (daily ed. Apr. 4, 1990)).

182. See, e.g., S. DOC. NO. 1834, 103d Cong., 2d Sess. (June 17, 1994), 140 CONG. REC. S13,852 (daily ed. Sept. 30, 1994); H.R. DOC. NO. 3800, 103d Cong., 2d Sess. (1994).

183. Olaf de Senerpont Domis, *Lender Liability Remains Gray Area as Lawmakers Hold Off on Superfund*, AM. BANKER, Oct. 12, 1994, at 3.

184. LENDER AND JUDICIARY FAIRNESS IN LIABILITY ACT OF 1995, H.R. DOC. NO. 200, 104th Cong., 1st Sess. (1995), 141 CONG. REC. H169 (daily ed. Jan. 4, 1995).

185. SUPERFUND REFORM ACT OF 1995, H.R. DOC. NO. 228, 104th Cong., 1st Sess. (1995), 141 CONG. REC. H228 (daily ed. Jan. 4, 1995).

III. EUROPEAN EFFORTS TO ESTABLISH CIVIL LIABILITY FOR ENVIRONMENTAL HARM EC DRAFT

A. *Directive on Civil Liability for Damage Caused by Waste*

Under the Fifth Environmental Action programme, an important objective of the EC is to establish an "integrated Community (Union) approach to environmental liability."¹⁸⁶ In furtherance of this objective, the European Commission issued its draft proposal for a Directive on Civil Liability for Damage Caused by Waste which sought to harmonize the laws of the Member States for environmental harm caused by waste.¹⁸⁷

The Directive holds producers¹⁸⁸ of waste civilly liable for environmental degradation and harm regardless of fault¹⁸⁹ where such producers have "actual control" of the waste at the time of the incident causing harm.¹⁹⁰ Since the Directive did not specifically define "actual control," an expansive interpretation of the language would likely extend liability to secured creditors.¹⁹¹ Unlike CERCLA, the Directive specifically provides for joint and several liability¹⁹² subject to the defenses of contributory negligence.¹⁹³ The liability for harm extends to bodily injury, damage to property, and environmental harm.¹⁹⁴ However, liability for remediation costs for environmental harm are limited to the costs which do not substantially exceed the benefits of full restoration.¹⁹⁵

186. Fifth Programme, *supra* note 18; Discussion Paper, *supra* note 3, at 8.

187. Proposal for a Council Directive on Civil Liability for Damages Caused by Waste, 32 O.J. (C 251) 3 (1989), COM(89)282 final [hereinafter Directive], *modified* by Amended Proposal for a Council Directive, COM(91)219 final [hereinafter Modified Directive]; see Patrick Thieffry & Peter Nahmias, *The European Community's Regulation and Control of Waste and the Adoption of Civil Liability*, 14 HASTINGS INT'L & COMP. L. REV. 949 (1991).

188. A producer is defined as any person "whose occupational activities produce waste and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature and composition of this waste, until the moment when the damage or injury to [the] environment is caused." Directive, *supra* note 187, art. 2, para. 1(a).

189. *Id.* art. 3.1.

190. Susan Nolan, Comment, *Foreclosing On Lender Liability: The European Union Launches Environmental, Civil Liability Legislation*, 7 TRANSNAT'L L. 257 (1994).

191. *Id.*

192. Directive, *supra* note 187, art. 5.

193. *Id.* art. 7, para. 2. Like CERCLA, the modified directive allowed *force majeure* as an affirmative defense. Modified Directive, *supra* note 187, art. 6.1.b.

194. Directive, *supra* note 187, art. 2, para. 1(c), (d).

195. *Id.* art. 4, para. 2.

Efforts to enact the Directive have largely been frustrated by legislative difficulties.¹⁹⁶ Due to the recent promulgation of the Green Paper, the likelihood that the Directive will be adopted or ever have binding force within the EC is negligible at best. Nevertheless, it represents the first attempt at the European approach of remedying environmental harm through the operation of civil liability.

B. Council of Europe's Draft Convention on Civil Liability

On June 21, 1993, the Council of Europe adopted its own approach to a civil liability regime with the passage of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment.¹⁹⁷ By adopting a "polluter pays" principle,¹⁹⁸ the stated purpose of the Convention is to ensure "adequate compensation for damage resulting from activities dangerous to the environment and also [to provide] for means of prevention and reinstatement."¹⁹⁹ To effectuate its goal, the Convention holds operators of dangerous activities liable for the damage caused by such activities to the extent they exercise control over the activities.²⁰⁰ In broad language, environmentally dangerous activities include the production, handling, storage, use, or discharge of dangerous substances which have properties which "constitute a significant risk for man, the environment, or property."²⁰¹ Similarly, the Convention defines the key terms such as "environment" and "incident" expansively in a manner that is reminiscent of CERCLA.²⁰² To provide a source of compensation, the Convention mandates that operators of dangerous activities be required to participate in a "financial security scheme" or maintain a financial guarantee up to a certain limit.²⁰³

The Convention does provide certain limitations and exemptions to its liability scheme. Although implicitly premised on a strict liability

196. Thieffry, *supra* note 19, at 1084.

197. Convention, *supra* note 23.

198. *Id.* pmb1.

199. *Id.* art. 1.

200. *Id.* arts. 2, 6.

201. *Id.* arts. 2(1), 2(2). The Convention lists a gamut of characteristics similar to those used to identify hazardous wastes in CERCLA such as explosive, oxidizing, flammable, toxic, corrosive, and carcinogenic. Convention, *supra* note 23.

202. The "environment" includes general categories of natural resources both abiotic and biotic. *Id.* art. 2(10). "Incident" extends to any occurrence or series of occurrences which actually cause damage or create a grave or imminent threat of causing damage. *Id.* art. 2(11) (emphasis added).

203. *Id.* art. 12.

standard, the convention provides that an operator is to be held liable for damages caused by activity over which it was exercising control. Where an incident consists of a continuous occurrence involving several operators, all operators are jointly and severally liable, but an individual operator is only liable to the extent that his exercise of control contributed to only part of the damage, provided he can prove the limitation.²⁰⁴ Exemptions exist for incidents caused by *force majeure*, third parties, and actions compelled by the state.²⁰⁵ Similar to the Directive, under the Convention's statute of limitations, an action must be brought within three years from the date on which the claimant knew or reasonably should have known of the damage, and under no circumstances can an action be brought after thirty years from the date of the incident causing the damage.²⁰⁶

The Convention has been subject to a wide degree of criticism. The European Commission has criticized the Convention for failing to outline provisions to protect competition within the European Union.²⁰⁷ Other commentators have complained that the strict liability and fault based liability provisions are unclear and give too much power to non-governmental organizations by giving them legal status to sue.²⁰⁸ At present, only eight of the Council States have signed²⁰⁹ and Denmark and the United Kingdom have stated that they will not support it.²¹⁰ Nevertheless, the Commission proposed in its Green Paper joining the Convention as a starting point to create an EU strict liability regime for remedying environmental damage.²¹¹

204. *Id.* art. 6(2).

205. Convention, *supra* note 23, art 8. A contracting state may also create a "state of the art" exemption by reservation excluding liability where the state of knowledge at the time of the incident was scientifically insufficient to reasonably assess the probable harm. *Id.* art. 35(1)(b).

206. *Id.* art. 17. The Convention adds an additional qualifier to the statute of limitations requiring the identity of the operator to be known or reasonably to have been known. *Id.* art. 17(1).

207. Nolan, *supra* note 20 (citing *Environment, EC Commentaries* (Coopers & Lybrand), Mar. 3, 1994, available in LEXIS, Intlaw Library, Eurscp. File).

208. Discussion Paper, *supra* note 3, at 9.

209. Cyprus, Greece, Iceland, Italy, Liechtenstein, Luxembourg, Finland, and The Netherlands signed the Convention upon its passage in 1993. Chris Clarke, *EU: Green Mountain-Environmental Liability*, CORP. COVER, Feb. 1, 1994.

210. *Environment: The Council of Europe Convention on Environmental Liability, EC Commentaries* (Coopers & Lybrand), Oct. 11, 1993, available in LEXIS, Intlaw Library, Eurscp. File.

211. Green Paper, *supra* note 17, § 4.1.2.

C. Green Paper on Remedying Environmental Damage

Spurred by the efforts of the Council of Europe and several major environmental accidents,²¹² the European Commission launched its Green Paper on Remedying Environmental Damage in 1993 to initiate community-wide discussion on the "usefulness of civil liability as a means of allocating responsibility for the costs of environmental restoration" and to investigate the use of a joint compensation scheme where civil liability fails.²¹³ The Green Paper does not propose any specific provisions for future EU legislation but rather explores alternatives and perspectives to be considered and commented on by Member States, industry, and European institutions. The underlying principle of the discussion did focus on the use of civil liability as "a legal and financial tool used to make those responsible for causing damage pay compensation for the cost of remedying that damage."²¹⁴

However, the Green Paper reveals some strong preferences the Commission has towards establishing a civil liability scheme in Europe. The Commission discussed the attributes of both a fault and strict liability based system showing a strong preference for a strict liability standard.²¹⁵ Strict liability provided for better risk management and legal certainty, facilitated more effectively by the "polluter pays" principle while assures that costs of damage caused by an economic activity are borne by the operator. Strict liability was a proven and recognized standard both in Europe and abroad for enforcing compliance with environmental laws.²¹⁶ Conversely, the fault based approach was not favored due to its onerous burdens of proof and the difficulty associated with judging whether an operator acted wrongfully.²¹⁷ The Commission had related concerns regarding the availability of insurance and the costs associated with mandatory insurance requirements where liability cannot be easily assessed.²¹⁸ However, citing the experience of the United States with

212. The Green Paper cited the Sandoz incident as an example. Green Paper, *supra* note 17, § 1. The Sandoz incident involved 1986 warehouse fire at a Swiss chemical manufacturing plant which resulted in a massive release of chemicals into the Rhine river. Economist Intelligence Unit, *Environmental Liability: European Community Threat of US Legislation*, BUS. EUR., Sept. 12, 1994.

213. Green Paper, *supra* note 17, § 1.

214. *Id.*

215. *Id.* § 4.1.2; see Thieffry, *supra* note 19, at 1085.

216. Green Paper, *supra* note 17, §§ 4.1.1- 4.21.

217. *Id.* § 4.1.1.

218. *Id.* § 2.1.11. The Commission also noted the insurance deficiencies and problems created as result of the CERCLA liability scheme. *Id.*

CERCLA, the Commission noted that an extensive strict liability regime can overburden certain sectors leading to further disruption of the economy.²¹⁹

In order to augment the shortcomings of a strict liability regime, the Green Paper discusses the utility of a "joint compensation system" similar to CERCLA.²²⁰ Such a system would be maintained by contributions from the economic sectors most closely associated with the environmental harm, preserving the "polluter pays" principle. The key advantages to such a fund are reduced response time for emergency and remedial action, cost spreading through the principle of shared responsibility, and full recovery of costs for failed recovery under the civil liability scheme due to bankruptcy or unidentified operators.²²¹ In response to this proposal, the Economic and Social Committee (ESC)²²² only supported the idea of a fund as a back up measure, provided the funds could be effectively used to respond to emergencies, that partial payment will be accepted until liability issues are resolved, and that there will be compensation for injured parties where full costs cannot be recovered.²²³ However, the ESC believed that no collective fund could replace any preferred civil liability scheme. This scheme was not favored in general because of its ability to weaken the concept of individual liability and act as another form of general taxation.²²⁴

The scope of liability was not addressed in any specific terms to predict the Commission's outcome on lender liability. The Commission raised the question of whether the channeling of liability should be to the party "with the technical know-how, resources and operational control of the activity."²²⁵ Although this language bears a striking resemblance to that of the Directive which the Commission also considered, the Commission commented that any such standard of liability would have to consider

219. *Id.* Thieffry, *supra* note 19, at 1086.

220. Green Paper, *supra* note 17, § 3.0. CERCLA currently taxes the oil industry as well as other high-risk sectors of the economy to support Superfund.

221. *Id.*

222. The Economic and Social Committee is comprised of 189 members in various areas of economic activity such as employers, workers, and interest groups. It is a primarily a consultant body representing those interests and is consulted on most Community legislation. EMILE NOEL, WORKING TOGETHER—THE INSTITUTIONS OF THE EUROPEAN COMMUNITY 48 (1993).

223. Economic & Social Committee Opinion on the Communication from the Commission to the Council, Parliament and the Economic and Social Committee: Green Paper on Remedying Environmental Damage 94 C 133/02, 1994 O.J. (C133) § 4.5.2 [hereinafter ESC Opinion].

224. *Id.* §§ 4.5.1, 4.5.3.

225. Green Paper, *supra* note 17, § 4.1.2(C).

lenders and financial institutions.²²⁶ The ESC raised the issue more directly, stating in its opinion that insurance companies and banks need to be safeguarded and "not given inappropriate responsibilities such as prior risk assessment which do not fall within their traditional sphere of responsibilities."²²⁷

The Green Paper has presently receded behind closed doors. Like the ESC, the European Parliament's legal committee issued an internal report commenting on the utility of an EU liability regime. The environment directorate general (DGXI) awarded two twelve month research projects to assess the effectiveness of existing liability regimes in individual countries. In tandem, the DGXI is preparing a series of opinion papers to be issued this year discussing possible EU civil liability schemes.²²⁸ Although France and the United Kingdom continue to show resistance to any community-wide liability plan, the continued progress of both the Convention and Green Paper, as well as increased national legislation, are building momentum. However, given the research projects by DGXI, it is doubtful any substantive legislation will appear until late in 1995 or early 1996.

IV. CONCLUSION

Lender liability in the United States under CERCLA has proven to be an unpredictable, if not unworkable framework especially for lenders in recent years. The liability scheme is based on the notion of strict liability in order to facilitate compliance and remediation efforts. Concurrently, the underlying principle of the Act is that those who cause environmental damage or who have control over activities resulting in environmental harm should pay for the remediation costs (i.e. the polluter pays principle). However, application of these fundamental principles to lenders have been inopposite at times. A European system of civil liability needs to address this inefficient shortcoming at the outset and develop a scheme which promotes both harmoniously.

Fleet Factors expanded the polluter pays principle to reach lenders who have the ability to influence hazardous waste decisions through their participation in financial management. The EPA's lender liability rules sought to narrow liability to wholly exclude financial or administrative management, limiting liability to cases where management of a facility

226. *Id.*

227. ESC Opinion, *supra* note 223, § 4.4.3.

228. Chris Clarke, UK: *Environmental Issues Special Report—Getting Into Shape*, CORP. COVER, Feb. 28, 1995, at 18.

extended to the control or responsibility for day-to-day operations or environmental compliance. Both represent extremes and do not equitably spread the risk of environmental liability. The present problems of insurability and availability of funds for loans has proven that the existing ambiguous scheme is unworkable and detrimental both to the economy and the environment. Lenders are demanding burdensome rates for certain key industries out of fear of incurring environmental liability. More frequently, lenders are simply refusing to make funds available for environmental projects, stifling environmental compliance and remediation. However, the answer is not to divorce lending practices from liability in such a narrow fashion as to insure secured creditors against environmental liability losses. Simplifying the calculus to direct control over operational aspects without consideration of the extensive influence of financial or administrative management is short sighted and overkill. The solution lies between the two.

Lenders are in the business of assessing risk and making loans on that basis. They need to have sufficient freedom to investigate and supervise a borrower's compliance with environmental laws without incurring liability themselves. Any liability scheme must provide clear guidelines for lenders to follow in order to better quantify risk and allocate costs. Lenders must also be allowed to conduct traditional pre- and post-foreclosure activities to protect their security interests so long as their conduct does not pass a certain threshold of activity. Thus lender liability should be limited to cases in which a lender exerts actual control over the day-to-day operations of a facility either through direct operational management or extensive financial or administrative management. The inquiry remains fact intensive to be decided on a case-by-case basis. However, some guidelines on permissible activities, similar to some of those announced in the EPA rules, need to be clearly spelled out at a legislative level to increase predictability. Any administrative agency given enforcement responsibilities should not be given the freedom to also define the parameters of an individual's liability because this undermines the judicial process and lends itself to administrative abuse.

The European Union needs to closely consider the relevant extremes and examine their feasibility as demonstrated in the United States. The United States experience is a perfect test case from which the Member States can learn. Any civil liability scheme should be based on strict liability to ensure effective remediation and decreased costs. It appears from the various pieces of liability legislation that the European nations have endorsed this position. Counter to the ESC's position, the utility of an environmental fund cannot be underestimated where the inherent process of litigation delays environmental response time and

remediation efforts. It is an effective cost-spreading method that makes up for the shortcomings of environmental civil liability. The need for quick response time buttressed by efficient cost-spreading outweighs the concerns about general taxation and reduced personal accountability. Personal accountability can be achieved through regulatory action and litigation after remediation efforts have been implemented to address dangerous environmental hazards. Spreading costs among the various polluting industries is not a disproportional burden to have to bear to ensure the protection of the environment and human welfare. Additionally, the administration of such a fund and the enforcement of civil liability within the European Union should be supervised by an expanded European Environmental Agency in conjunction with the Commission's DGXI division. Such an expanded agency would be able to ensure compliance and administrate remediation efforts, much like the EPA, while further promoting environmental harmonization among the Member States.

In pursuit of more effective enforcement and harmonization of standards, any EU legislation should be in the form of a regulation, as opposed to a directive, in order to create direct application of a European-wide liability scheme across all Member States. The mandate for this power is provided for by the environmental provisions of both the Single European Act and the Maastricht Treaty. At this level, limitations on lender liability need to be clearly articulated in language that narrows liability to an operational level to ensure that the polluter pays principle is balanced with such a strict liability regime. With the added degree of clarity and specific guidelines, the European Union can avoid the United States costly and unpredictable experience. Arguably, the heightened transaction costs created by lender liability will impact business, but specific guidelines will allow more reliable risk assessment while promoting environmental compliance.